

IV. REASONABLE RIGHT-OF-WAY COMPENSATION IS NOT A BARRIER TO ENTRY.

A. A Local Government Has A Right To Gain A Fair Price For Its Property.

Many telecommunications providers would have the Commission conclude that any compensation requirement is an impediment to the development of competitive networks, or, failing this, that local governments can at least be limited to cost recovery. This suggestion, however, is inconsistent with basic property rights.⁴³ A local government has a right to gain a fair price for its property, just as any private-sector party does. A private-sector property owner has a right to rent its property for the *market value* of that property, not merely its costs (much less its *administrative* costs). So does a local government.

Because private property interests are constitutionally protected, the courts' analysis of the value involved in the context of unconstitutional taking (further discussed below) is relevant. The Supreme Court has addressed the wide range of property interests that, if seized by federal action, would constitute a taking.⁴⁴ The opinion in *Lucas v. South Carolina Coastal Council* indicates that the "interests" cognizable for 5th Amendment purposes "may lie in how

⁴² Glasner, *High Bandwidth Bureaucracy*, Wired News, March 25, 1999. See also Ellen Perlman, *Taxing the Craters in the Street*, Governing, February 1997. (Attachment A).

⁴³ It should be noted that the status of local property rights in the public rights-of-way depends on state law. Thus, many telecommunications providers have sought to gain rent-free access to the public rights-of-way via the state legislative process. This issue at the state level is, however, irrelevant to the central issue as to right-of-way compensation in this proceeding, which is whether the *federal* government can seize local (or state) property to subsidize telecommunications providers. Thus, the discussion below will speak in terms of local governments' property rights, while recognizing that the allocation of property rights between *state and local* governments is handled in state law.

⁴⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land." In other words, if the access/use sought by the telecommunications company was cognizable if requested from a private property owner, then it should be comparably valued and enforceable in a public property context. The illusory plausibility of a compensation scheme strictly limited to costs rests on the unstated and erroneous belief that a local government *lacks* the right to sell or lease its property for its full market value.⁴⁵

For this reason, any analysis that focuses on *recovery of costs* as the sole purpose of right-of-way compensation is misguided. The persistent (but unsound) impression that local government property is not entitled to the same protection as other property may account for the fact that courts have not yet arrived at an unambiguous result in this area. The NOI cites with apparent approval cases that suggest local governments may only recover right-of-way costs, while relegating to a "but see" footnote the contrary result in cases such as *Dearborn*.⁴⁶ But when the Commission refers back to the language of the statute, it must recognize that

⁴⁵ Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket 96-46, Comments of National League of Cities, filed Apr. 1, 1996 (National League of Cities OVS Comments); Joint Motion to Dismiss of PROTEC, the Michigan Municipal League, the Michigan Townships Association, the United States Conference of Mayors, the City of Los Angeles, California, and the Michigan Communities, *In the Matter of TCI Cablevision Of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541,544(e) and 253*, File No. CSR-4790, filed Sept. 4, 1996 (PROTEC Motion); Appellant Brief of *Prince Georges County v. Bell Atlantic*, 4th Cir., Case No. 99-1784, filed Aug. 2, 1999 (Attachment D).

⁴⁶ See NOI at ¶ 78 & n.200. In *Dearborn* the court recognized that conveying to a telecommunications provider the valuable right of access and use of the public's property warrants additional compensation based on the value conveyed. 16 F.Supp.2d 785, 789 (E.D. Mich. 1998).

compensation requirements, not merely cost recovery, are outside the sphere of "barriers to entry."⁴⁷

The Commission's own spectrum auction policies are directly analogous.⁴⁸ In devising a scheme to permit telecommunications providers to use a public resource – the electromagnetic spectrum – the Commission made no pretense of limiting the providers' payments to costs of any kind. Rather, the Commission recognized that the user of such a common resource for profit should be required to pay fair market value for that use, and employed an auction mechanism to establish that value. Indeed, the Commission congratulated itself for wise stewardship of the federal government's "property" (which, unlike the public rights-of-way, was "acquired" without cost) based on the large sums telecommunications providers were willing to pay for its use.⁴⁹ The Commission's reasoning is well-founded: spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism. It would be most extraordinarily inconsistent if the Commission

⁴⁷ See NOI at ¶ 75 ("local governments have an important interest in . . . obtaining fair and nondiscriminatory compensation for use of the rights-of-way").

⁴⁸ The Commission refers to its spectrum auctions in the NOI at ¶¶ 10, 15. See generally *FCC Report to Congress on Spectrum Auctions* (October, 1997).

⁴⁹ The spectrum auction is a "cash cow." [W]e're trying to milk it for billions more in auction revenue." Statement of Commission Chairman Reed Hundt, *Hundt Calls Budget Slash A "Mistake,"* Broadcasting & Cable, September 11, 1995. "It would be wrong to allocate these valuable resources for less than their real, free market value." Letter from Sen. John McCain to Commission Chairman Reed Hundt (August 8, 1995). Chris McConnell, *Senator John McCain to force Federal Communications Commission to auction direct broadcasting satellite frequencies reclaimed from Advanced Communications Corp.,* Broadcasting & Cable, September 18, 1995, at 7. "The digital spectrum is beachfront property on the Cybersea." Commission Chairman Reed Hundt, quoted by Chris McConnell, *Staking Claim to Digital TV,* Broadcasting & Cable, December 18, 1995, at 26.

were now to take the position that *local* property, unlike federal property, can be given away *by the federal government* to telecommunications companies without such compensation.

A word should perhaps be added regarding local governments' attempt to develop sound measures of market value for their property. Such a measure is appropriately based on the value derived by the user from its right-of-way use. Revenue-based compensation is one such method (analogous to the franchise fees paid by cable operators, which are based on gross revenues). A compensation arrangement based on gross revenues has the advantage of directly reflecting the value of the use. In addition, it automatically self-adjusts to the shifting fortunes of the right-of-way user in the market. As revenues increase, reflecting the increased value the user is deriving from use of the right-of-way, a revenue-based payment increases to match. And should the telecommunications provider's market fail, the right-of-way payment scales back accordingly. Thus start-up companies with little or no revenues, and long-established telecommunications behemoths, may be charged by the same gross revenue-based standard and yet pay, as a result, dollar amounts that fairly reflect the value each is deriving from the public rights-of-way. A start-up, or a company in trouble, automatically pays a relatively low price, while a fabulously successful company pays more – yet a consistent *proportion* of revenues is paid by each competitor. Thus, such a standard (as distinct from a fixed dollar amount) encourages competitive entry. It is also consistent with revenue-based fees in other industries as diverse as percentage of gross revenues for shopping center space rentals and the 12.5 percent royalty paid to the State of Alaska by crude oil producers for use of the State's property.⁵⁰

⁵⁰ See Alaska Stat. § 31.13.020 (1999).

It may be suggested that calculating such revenues may be difficult in practice. This, however, is exactly the sort of workability issue that is best resolved by allowing localities to experiment with revenue-based fees, as well as other types of fee arrangements, where they find such approaches appropriate. The Commission's best course is not to seek to interfere with local communities' attempts to find sound measures of market value, but to encourage such experimentation in the right-of-way marketplace.

B. Resources Will Be Allocated Properly And Efficiently Only If Each Enterprise Pays A Fair Price For The Resources It Uses.

From the standpoint of economic efficiency, as well as equity, it is incorrect to suggest that charging compensation which represents the value of the property used is somehow a barrier to entry. In a free market economy, market entrants in every industry are normally expected to pay fair market value for the property they use. If some resources are sold at artificially low prices, this subsidy tends to distort the market, by attracting investment to alternatives (for example, types of telecommunications networks) that actually cost more than their apparent price would indicate. The result is a misallocation of resources: the available resources are not being used in the most efficient fashion.⁵¹

This economic rationale, too, is reflected in the Commission's approach to spectrum auctions. No reason has yet been suggested why the *federal* spectrum resource should be made available only at the best price bid, while *local* public rights-of-way resources should be given

⁵¹ "Classical economic theory holds that subsidies distort the market outcome that would have occurred absent the subsidy, thereby creating inefficiencies in resource allocation which lower global welfare." Robert H. Lantz, 10 Am. U.J. Int'l L. & Pol'y 993, 1009 (Spring 1995), citing Jeffrey E. Garten, New Challenges in the World Economy: The

away at below-market prices. Nor has the Commission taken the position that its own spectrum auctions slow the development of competitive networks by charging a fair price. By its own practice and pronouncements, the Commission is committed to the position that *fair compensation for use of a resource does not impede competition*.

C. Prohibiting Local Governments from Collecting Fair Compensation Would Create A Subsidy.

A federal or state law that prevented a community from charging a fair price for its property would in effect forcibly transfer funds from the community to the user of the property (the telecommunications provider). This would constitute a forced subsidy of the provider by the community. In the days when a single monopoly telephone provider, the nationwide Bell System, provided universal service, it might have been plausible to think of this as a harmless subsidy from the community to itself (all citizens own the public rights-of-way, all citizens receive telephone service). But in a competitive market, where the telecommunications provider does not provide universal service and the variety of services offered are largely unconfined by rate regulation, that pre-competition rationale fails to hold. If *all* citizens are compelled to contribute their property (local rights-of-way) at below-market prices in order to lower the costs for the favored telecommunications provider and its customers, the citizens are subsidizing the telecommunications provider (and its customers).

Should a local community choose to use its own property to subsidize new entrants, such a policy can be debated and resolved by the affected citizens themselves through normal democratic processes. But the federal government cannot take local property for a forced

Antidumping Law and U.S. Trade Policy, Remarks Before the U.S. Chamber of Commerce, Washington, D.C. (Apr. 7, 1994) (quoting Jagdish N. Bhagwati, *Protectionism* (1988)).

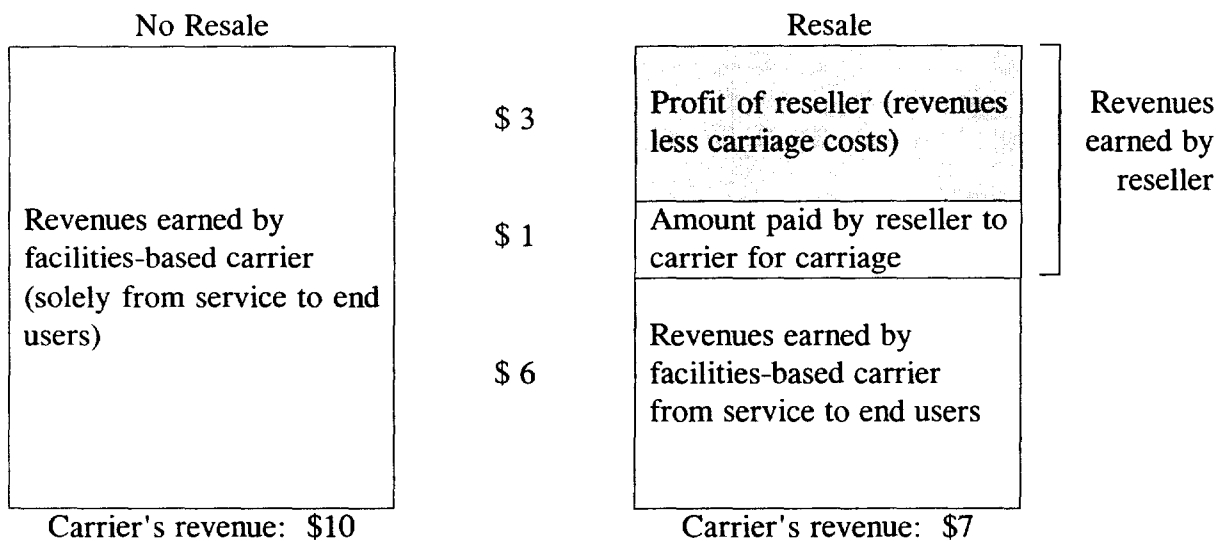
subsidy. Such a taking would represent an unfunded mandate imposed on localities by the federal government. In the 1996 Act, Congress avoided any suggestion that its competitive policies might impact localities in this way, precisely in order to avoid conflict with the Unfunded Mandates Act.⁵²

D. The Full Value of Right-of-Way Use Cannot Be Recovered Unless Indirect Use By Resellers Is Taken Into Account.

The discussion of revenue-based fees above raises the subsidiary question of how the value of the telecommunications use should be calculated when some of the benefit derived from that use is indirect – for example, through resale. Local governments seeking to develop fair and consistent rules for right-of-way use encounter a complication when some telecommunications providers gain all the benefit of such use themselves (by selling services directly to end users), while others in effect split that benefit with resellers. When a facilities-based carrier sells capacity at wholesale to a second company that realizes further revenues by resale to end users, it is necessary to take *both* revenue streams into account in order to achieve parity with a similar facilities-based carrier that sells only to end users.

The anomaly local governments are seeking to avoid may be illustrated by analyzing graphically the benefits (revenues) derived from the use of the public rights-of-way.

⁵² Remarks of Congressman Stupak, 141 Cong. Rec., August 4, 1995, at H 8460 (daily ed.). See Unfunded Mandates Act, 2 U.S.C. § 1501 *et seq.*



In a resale arrangement, the total revenues earned from use of the public rights-of-way by the carrier's facilities may be the same as where the carrier sells only to end users – in this example, \$10. But some of those end-user revenues will be collected by the facilities owner and some by the reseller. The reseller in turn will pay some fraction of its revenues to the carrier in return for the use of the facilities (in the above illustration, \$1). But necessarily (if the reseller is to survive at all), there will be revenues received by the reseller that are *not* paid to the carrier (above, \$3). If right-of-way compensation is based *only* on the revenues received *by the carrier*, some of the resulting value will not be subject to compensation and the owner of the public rights-of-way will not be made whole. The two systems will in such a case be treated differently, even if they are identical systems with identical capacity serving an identical number of end users – merely because of the way in which the sale arrangements are structured.

Moreover, the point becomes more significant when one realizes that the reseller may itself be an affiliate of the carrier. It is perfectly possible for a facilities-based carrier to create

a subsidiary to market the capacity, and to lease *all* its capacity to this subsidiary for resale to end users. As a result, the carrier might receive only \$1 of the above \$10, as the reseller's payment for carriage. In fact, in such a situation the carrier will have every incentive to make a "sweetheart deal" with its subsidiary to minimize the cost of carriage (since the same company ultimately receives all the benefits in any case). The payment for resale, which is subject to right-of-way fees, may thus become vanishingly small, even though there is no economic difference in the facilities installed or the services provided, only in the corporate structure devised by the telecommunications provider.

Thus a rule such as that enunciated in *Dallas II*,⁵³ in addition to preventing the community from receiving the full value of its property, lends itself to evasion through juggling corporate structures and intracorporate transfer payments. And, as noted above, the result of such a rule would be dissimilar treatment based solely on corporate structure: two telecommunications providers could carry on exactly the same business, earn exactly the same revenues, yet would have to be differently treated because one had configured itself as a facilities owner selling service to a reseller while the other sold directly to end users.

For this reason local communities have sought to develop right-of-way compensation structures that take into account all the revenues derived from the facilities' use of the public rights-of-way (whether by the facilities owner or otherwise). It is essential that local community property owners be free to work out such arrangements so as to recover the full value of their assets and ensure like treatment for like systems.

⁵³ *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F.Supp. 2d 756 (N.D. Tex) ("*Dallas II*").

E. Local Communities Seek To Apply Reasonable Right-Of-Way Compensation Requirements Fairly To All Competitors.

The Commission is rightly troubled by the notion of right-of-way arrangements that would "favor incumbent LECs over competing carriers."⁵⁴ Local governments share this concern. In every case where a local community addresses telecommunications use of the public rights-of-way, the single most difficult question is how to deal with the incumbent LEC – the proverbial "900-pound gorilla" in the local telecommunications market.

For purposes of this proceeding, the key fact is that the problem stems not from the local governments, but from the incumbent LECs that seek special treatment under federal, state, or local law. A single example may suffice. Prince George's County, Maryland, adopted a telecommunications ordinance in 1998 to create a fair and nondiscriminatory structure for managing its rights-of-way and obtaining fair compensation. Before that ordinance could take effect, however, the County was sued by the incumbent, Bell Atlantic, claiming among other things that Bell Atlantic had special privileges under state law.⁵⁵ The matter is now on appeal before the Fourth Circuit Court of Appeals, and it remains to be seen whether Bell Atlantic will defeat the County's attempt to manage its right-of-way in a way that would *not* favor the incumbent LEC.

The example underscores the fact that anomalies in the treatment of incumbent LECs tend to arise from sources other than local governments. If the Commission wishes to resolve such anomalies, it must take some tack other than attempting to ratify and generalize such

⁵⁴ NOI at ¶ 75.

incumbents' claims to special privileges. To the extent that state or federal laws or regulations favoring the incumbents exist, they are historical relics with no place in a modern competitive environment. At best, such rules are based on a century-old notion of a social compact with the Bell System that allowed a statutory monopoly in return for rate regulation and universal service. That compact no longer applies in today's market as that market is established by federal and state law, with universal service managed through multiple providers rather than a single monopolist, and rate regulation applied more and more leniently to fewer and fewer services. Times change, and the incumbents' views of their historic rights must change with them.

V. SECTION 253 DOES NOT PROHIBIT REASONABLE MANAGEMENT OF AND COMPENSATION FOR PUBLIC RIGHTS-OF-WAY.

The Telecommunications Act of 1996 sought to promote the entry of multiple, competing telecommunications providers, without transgressing the rights and responsibilities of state and local governments. Congress explicitly resolved these two goals in the final text of 47 U.S.C. § 253 (Removal of Barriers to Entry). An accurate analysis of Section 253 is thus crucial to any Commission action on right-of-way issues.⁵⁶

A. Section 253(a) Applies Only If Section 253(c) Is Not Involved.

Section 253(a) proscribes state and local legal requirements that “may prohibit or have the effect of prohibiting the ability of any entity” to provide telecommunications services.

⁵⁵ *Bell Atlantic-Maryland v. Prince Georges County*, CA J.F.M-98CV4187, Memorandum in Support of Defendants' Motion to Dismiss, U.S. District for the District of Maryland, Jan. 26, 1999, at 12 (Attachment D).

Only if that condition is met – in other words, an entity would be *prohibited* from providing telecommunications services – does the preemptive effect of § 253(a) apply. Thus, the principal work of the Commission in reviewing a claim under § 253 is to determine whether a state or local requirement prohibits an entity from providing service.

Before the Commission can reach the § 253(a) question, however, it must consider the threshold requirements created by § 253(b) through (d). Subsections (b) and (c) establish two “safe harbors” that keep certain types of state and local legal requirements out of the scope of the general prohibition in subsection (a). The first of these, subsection (b), has to do with state regulatory authority. The second, subsection (c), is directly relevant to the inquiry in this proceeding. Subsection (c) eliminates from the scope of the prohibition in subsection (a) any state or local legal requirements involving the authority of a state or local government “to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis,” if the compensation is publicly disclosed. Thus, § 253(c) preserves a local government’s authority to manage its rights-of-way and require fair and reasonable compensation, subject only to the condition that its authority be exercised on a competitively neutral and nondiscriminatory basis. If this threshold condition is met, the Commission need not (and cannot) address the issue of whether such a requirement might otherwise be prohibited by subsection (a).

Moreover, the Commission’s authority to preempt under Section 253 is defined by subsection (d). This provision states that the Commission may preempt if it makes a

⁵⁶ See NOI at ¶ 73 & n.185.

determination under "subsection (a) or (b)." The preemption provision, in other words, *excludes* subsection (c), which remains outside the Commission's jurisdiction. Thus, if § 253(c) is implicated, the Commission may not decide the matter.

This straightforward analysis of how Section 253 functions makes clear that the Commission lacks jurisdiction to take actions (even to promote competitive networks) that would infringe upon local property rights in the public rights-of-way. However, the confusion that has developed in some quarters over the proper interpretation of Section 253 requires a more detailed examination of the purpose and operation of that section.

B. Congress Intended Section 253(c) to Preserve Local Authority to Impose Reasonable Compensation And Management Requirements.

Subsection 253(c) protects state and local authority to manage and receive compensation for local rights-of-way. If a state or local requirement falls within the scope of the subsection (c) "safe harbor," then subsection (a) is inapplicable to the requirement, and the Commission has no jurisdiction under subsection (d) to make a determination.

The legislative history of Section 253(c) reveals that it was inserted specifically to preserve local authority over reasonable right-of-way compensation and management. The Senate bill which eventually became the 1996 Act was introduced without any safe harbor for local governments. However, as the bill was reported out by the Senate Commerce Committee, subsection (c) contained in much its present form a safe harbor limited to local governments only. At that point, subsection (d) conferred preemptive powers on the Commission generally with respect to barriers to entry.⁵⁷

⁵⁷ S. Rep. 104-23, at 35 (1995).

Subsection (d), however, was amended on the floor of the Senate by voice vote to circumscribe the Commission's preemptive authority. The Senate approved a compromise amendment sponsored by Senator Gorton (R-Wash.). The purpose of the Gorton amendment was to preclude Commission jurisdiction over disputes involving local governmental authority over rights-of-way management and compensation, while preserving Commission jurisdiction over other forms of telecommunications business regulation by state or local regulators. In explaining his amendment, Senator Gorton noted that matters of primarily local concern should be “exempted” from subsection (a).⁵⁸ Senator Gorton stated, “There is no preemption ... for subsection (c) which is entitled ‘Local Government Authority,’ and which preserves to local governments control over their public right of way.”⁵⁹ Thus, the exclusion of subsection (c) from mention in subsection (d) was intended to remove any Commission jurisdiction over subsection (c) issues. Congress rightly recognized that local communities' right-of-way authority is outside the purview of a federal regulatory agency.

The corresponding bill introduced in the House contained a preemption section⁶⁰ that included both a safe harbor provision analogous to that in Section 253(b) of the 1996 Act, and a provision requiring “parity” of franchise fees and other local charges between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). This parity provision was cast in the form of a prohibition (“no local government may impose or collect...”). These two provisions were generally referred to as the “MFS amendment,”

⁵⁸ 141 Cong. Rec. for June 14, 1995, at S 8306, 8308.

⁵⁹ 141 Cong. Rec. S. 8213 (Daily ed. July 13, 1995).

⁶⁰ Section 243 (Preemption).

because that company had successfully sought inclusion of similar language in H.R. 4103, a predecessor bill in the 103d Congress.

After hearings in which witnesses testified in opposition to the MFS amendment, negotiations among certain Representatives failed to resolve the issue of how the bill should treat right-of-way issues.⁶¹ The debate then moved to the floor of the House. After debate, the House adopted the Barton-Stupak amendment by the overwhelming vote of 338-86.⁶² The Barton-Stupak amendment struck all of the existing preemption section, including the MFS amendment, and substituted new language essentially the same as that of the Senate Committee, with three exceptions not directly material here. Speaking in support of the Barton-Stupak amendment, Representative Barton stated:

[The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their right-of-way.⁶³

⁶¹ Representatives Schaefer (R-Colo.), the leading proponent of the MFS amendment; Representative Barton (R-Texas), of the majority, and Representative Stupak. In these negotiations the parties failed to reach agreement on replacing certain bill language that, in the words of the Committee's Report on H.R. 1555, H. Rpt. 104-204, would "discriminate[] among providers of telecommunications services (including the LEC)." *Id.* at 75-76

⁶² *Id.* at H8477. The Barton-Stupak amendment was adopted despite Representative Schaefer's objection that the amendment "is going to allow the local governments to slow down and even derail the movement to level competition." 141 Cong. Rec. for August 4, 1995 at H 8460-61. In other words, in enacting the Barton-Stupak amendment, Congress considered specifically whether to allow preemption if local governments were slowing down competition – which they are not – and *rejected* preemption even in that unlikely case.

⁶³ 141 Cong. Rec. for August 4, 1995 at H 8460.

A vote rejecting the so-called “parity provision” and narrowing the express preemption provision of what ultimately became Section 601(c) to state and local taxes followed.

Despite the overwhelming House vote for the Barton-Stupak amendment and the unanimous adoption of the Gorton amendment on the Senate floor, the debate over local right-of-way management and compensation language continued into the conference committee. The final conference agreement on the bills as adopted by both houses, however, adopted the Senate language of Section 253. The final law thus preserves the safe harbor protecting the authority of local governments over right-of-way management and compensation.

The language that introduces Section 253(c) as finally enacted (“Nothing in this section affects...”) is strongly reminiscent of that introducing Section 2(b) of the 1934 Act, 47 U.S.C. § 153(b) (“Nothing in this act shall ... apply ...”).⁶⁴ The Supreme Court held that language to be an overarching denial of jurisdiction to the Commission in *Louisiana PSC v. FCC*, 476 U.S. 355, 370, 374 (1986) (the language “fences off” this area from FCC jurisdiction). *See also Iowa Utilities Board v. FCC*, 120 F3d 753, 800 (8th Cir. 1997), *certiorari granted*, 118 S.Ct. 879 (1998) (“a fence that is hog tight, horse high, and bull strong”).

It should be noted that the exclusion of FCC jurisdiction in Section 253 relates to local governments' "*compensation*" for use of their public rights-of-way. The plain meaning of "*compensation*" is a freely negotiated value arrived at through arm's length negotiations

⁶⁴ This is the same section 2(b) that the drafters of Section 243(e) of H.R. 1555 (part of the “MFS amendment”) had thought necessary to expressly override in their 1995 attempt to give the Commission jurisdiction over such matters.

between the buyer and the seller.⁶⁵ Congress' use of the term "compensation" thus ensures that local governments can charge *rent*, not merely costs, for telecommunications providers' uses of their public rights-of-way. Any claims that (for example) local governments can collect only management fees from right-of-way users must be rejected as an attempt to read the word "compensation" out of Section 253(c).

C. Section 253 Precludes the Commission From Addressing Issues Regarding Local Right-Of-Way Compensation Or Management.

As pointed out above, the Commission's authority under Section 253(d) does not extend to disputes arising under Section 253(c) concerning local right-of-way compensation or management. As shown above, subsection (d) was intended to give the Commission authority to resolve only subsection (a) and (b) disputes, and to *withhold* from the Commission any authority over subsection (c) disputes. As a result, the Commission not only lacks the authority to make a § 253(a) determination where § 253(c) applies, but also lacks the authority to determine whether the requirements of Section 253(c) have been satisfied – for example, whether compensation charged by a municipality is "fair and reasonable" or whether right-of-way management or compensation requirements are exercised on a "competitively neutral and nondiscriminatory basis." Congress intended these questions to be left to the courts.⁶⁶ It follows that the Commission cannot take any action to promote competitive networks that would implicate § 253(c) in any way.

⁶⁵ Thus, for example, when courts examine condemnation claims, they seek to establish the value (not the cost) of the property interest condemned, generally through expert testimony on the current "market price" between willing sellers and buyers.

The legislative history of § 253(d) shows that it was intended to preserve the clear intent of Congress that the Commission should have no jurisdiction over subsection (c) disputes, leaving them to the courts. As noted above, Subsection 253(d), the preemption provision, was added in Conference, based on Section 254 of the Senate Bill.⁶⁷ In the Senate, § 254(d), as originally proposed, contained a sweeping preemption provision that did not exclude subsection (c) from its coverage. After a proposed amendment to remove the preemption provision in subsection (d) entirely, and after substantial debate on the Senate floor, a compromise amendment, offered by Senator Gorton, was adopted to preserve state and local authority over management of and compensation for the public rights-of-way. The Gorton amendment, adopted by unanimous voice vote, revised subsection (d) to clarify that subsection (c) disputes would not be subject to FCC preemption authority under subsection (d).

Senator Gorton, the author of the successful compromise amendment, stated:

There is *no* preemption . . . for subsection (c) which is entitled, "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that *any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions*.⁶⁸

The intent of Congress to reject FCC preemptive authority over local right-of-way authority is further clarified by the Conference Report:

⁶⁶ For a further discussion of the Commission's lack of authority in regard to Section 253(c) disputes see PROTEC Motion, *supra* n.45 (Attachment D).

⁶⁷ The House provision did not contain any preemption provision at all. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 126-27 (1996). Thus, the history of the provision must be found in the Senate bill, S. 652, rather than in the House.

The conference agreement adopts the House provision [under Section 601] stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.⁶⁹

Thus, the Commission's subsection (d) preemptive power can come into play *only* where subsection (c) does not apply, and the courts, not the Commission, must determine whether subsection (c) applies. Subsection (c) takes the Commission completely out of the business of regulating state and local right-of-way management and compensation.

In addition, the 1996 Act specifically precludes any attempt to derive preemption indirectly by implication:

NO IMPLIED EFFECT. –This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.⁷⁰

It may be noted that even the authority granted to the Commission under subsections 253(a) and (b) is not susceptible to sweeping action in a general rulemaking. Section 253(d) permits the Commission to exercise preemptive powers with respect to subsections (a) and (b) only "after notice and an opportunity for public comment" and with respect to determination that "a State or local government has permitted or imposed *any statute, regulation, or legal requirement . . .*" This language makes clear that § 253(d) is designed for case-by-case review by the Commission of particular requirements, not for broad preemption of entire categories of requirements.

⁶⁸ 141 Cong. Rec. S 8213 (Daily Ed. July 13, 1995) (June 13, 1995) (remarks of Sen. Gorton) (emphasis added).

⁶⁹ H.R. Conf. Rep. No. 458, 104th Cong., 2d. Sess., 201 (1996).

⁷⁰ Telecommunications Act of 1996 at § 601(c)(1).

D. The Commission May Not Defeat Congressional Intent Through a Back-Door Reinterpretation of Section 332(C)(3).

Paragraph 74 of the NOI seems to make the curious suggestion that Section 332(c)(3), which prohibits state or local "authority to regulate the entry of or the rates charged by" commercial mobile radio service ("CMRS") providers, might somehow allow the Commission to execute an end run around the clear intent of Congress, analyzed in detail above, to preserve local right-of-way authority from any interference by the Commission. It is unclear, however, how it would be possible for any local right-of-way requirement (in the words of the NOI) to "function[] as an entry regulation" fitting the conditions to which § 332(c)(3) refers.⁷¹ Actions by local communities with respect to the use of their property by CMRS providers would have nothing to do with regulation of the CMRS providers' rates for service. Nor would right-of-way management or compensation requirements attempt to "regulate . . . entry." As noted above, merely charging a fair price for a resource, or exercising reasonable management responsibilities, cannot be construed as an "entry regulation." Thus, the category described by paragraph 74 as right-of-way requirements that would be "not permissible as applied to CMRS providers" does not seem to exist.

Moreover, to the extent that it can be understood, the speculative notion apparently brought forward by paragraph 74 also seems to conflict with § 332(c)(7), which explicitly *preserves* local rights with regard to wireless antenna placement against any potential Commission preemption.⁷² If the Commission conceives of a category of right-of-way

⁷¹ NOI at ¶ 74.

⁷² See *In the Matter of Promotion of Competitive Networks in Local Telecommunications*, WT Docket No. 99-217, Implementation of the Local Competition

requirements that might somehow be preempted by § 332(c)(3), we would request that the Commission clarify how or why this might occur, so that local communities can respond in detail.

VI. ANY COMMISSION ATTEMPT TO DEPRIVE LOCALITIES OF COMPENSATION WOULD BE AN UNCONSTITUTIONAL TAKING.

Any initiative regarding competitive networks that would affect local public rights-of-way must also, of course, take into account the constitutional rights of local communities against federal taking of their private property. This issue has been recently addressed by the courts, and by local communities, in the context of the OVS regulations.⁷³ The same basic constitutional principles apply in the context of § 253 and competitive networks generally.

It is well established that local governments have a property interest in their public rights-of-way. Local government property enjoys the same constitutional protection as other forms of “private property” under the federal constitution. The federal courts, from the Supreme Court's opinion a century ago in *St. Louis*⁷⁴ to the recent Fifth Circuit OVS decision, recognize that local governments have the normal rights of all property owners in controlling all elements of the benefits of this property. If the federal government seizes a property interest, the federal government must pay the *entire value* of any private property that is so confiscated.

Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Joint Comments of the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and Montgomery County, Maryland, filed Aug. 27, 1999.

⁷³ National League of Cities OVS Comments, *supra*, n.45 (Attachment D).

⁷⁴ *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, *opinion on reh'g*, 149 U.S. 465 (1893).

Any Commission rule, or statutory interpretation, that required local governments to allow telecommunications providers to use and occupy their property would violate the Fifth Amendment. Under the Constitution, local governments have a right to be compensated for the *entire value* of any property that is confiscated by FCC action. The Commission, however, lacks authority to order such compensation, and thus lacks authority to dispose of local community property on behalf of telecommunications providers.⁷⁵

VII. THE COMMISSION HAS NO AUTHORITY TO PREEMPT TAX LAWS.

As the above discussion indicates, the issues surrounding local public rights-of-way have been addressed in prior Commission proceedings and before the courts. The NOI, however, raises a relatively novel issue in seeking to address state and local tax policy generally.⁷⁶ Because state and local taxation lies outside the Commission's jurisdiction, it appears that this issue can be addressed relatively briefly. If necessary, specific allegations by the telecommunications industry may be addressed in reply comments.

⁷⁵ The Anti-Deficiency Act, as codified in part at 31 U.S.C. § 1341, provides that no officer or employee of the United States Government may

(A) make or authorize an expenditure or obligation exceeding an amount available in appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. *See Initial Comments of the Real Access Alliance, In the Matter of Promotion of Competitive Networks in Local Telecommunications*, WT Docket No. 99-217, filed August 27, 1999, p. 42.

⁷⁶ *See* NOI at ¶¶ 81-84.

A. Section 601(c)(2) of the Telecommunications Act Of 1996 Expressly Preserves the Taxing Authority of Local Governments.

The NOI recognizes that “assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments’ other functions.” Congress agrees. For this reason 47 U.S.C. §601(c) provides that:

. . . nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 (Franchise Fees) and 653(c) (Reduced Regulatory Burdens for Open Video Systems) of the Communications Act of 1934 and section 602 (Preemption of Local Taxation with Respect to Direct-to-Home Services) of this Act.

Thus, any issues arising with respect to state and local taxation of telecommunications providers are to be dealt with through the courts on generally applicable principles of tax law. Congress has foreclosed the notion that the Commission, through its general regulatory authority or otherwise, could embark on a campaign of nationwide tax preemption on behalf of telecommunications companies.⁷⁷

B. Executive Order 13,132 Requires Express Authority for Federal Preemption.

The intent of Congress expressed in § 601(c) is underlined by the parallel intent of the President as recently expressed by executive order. Executive Order 13,132 on Federalism was adopted on August 4, 1999.⁷⁸ Among other things, the Executive Order requires (1) strict

⁷⁷ In addition, any claim of implied authority to preempt tax laws would be barred by § 601(c)(1) of the 1996 Act.

⁷⁸ Exec. Order No. 13,132, 3 C.F.R. ____ (Aug. 4, 1999) (to be codified).

adherence to constitutional principles (thus drawing the Commission's attention to the takings issues raised above, as well as the boundaries established by the Tenth Amendment); (2) preemption only where "the statute contains an express preemption provision" or there is some clear evidence of congressional intent to preempt; (3) restriction of preemption to the minimum level necessary to achieve the federal objective; and (4) extensive consultation with affected state and local officials prior to any preemption. Since Congress has not only failed to evidence clear intent to preempt in this case, but, on the contrary, has specifically stated its intent *not* to preempt, the Executive Order prohibits Commission action on state and local tax policy.

C. There Is No Evidence That State and Local Tax Issues Cannot Be Resolved Without Federal Preemption.

Even if the Commission had the authority to preempt state and local taxes, there is no evidence that Commission action is needed. In the first place, as noted above, local communities, like the Commission, have every reason to encourage the development of competitive networks. The NOI notes that "[s]tate and local governments share our goal of ensuring that tax burdens on telecommunications carriers are imposed fairly so as not to impeded competition."⁷⁹ Even in terms of self-interest alone, local communities have no incentive to adopt tax laws that would inhibit competitive provider entry into local markets. To the extent that telecommunications businesses do pay local taxes, the more taxpayers and more revenue generated by those taxpayers, the more revenue the local government may collect. Thus communities have an incentive to promote competitive entry, which expands the

⁷⁹ NOI at ¶ 81.

market generally and encourages new services. Taxes that would discourage potential taxpayers, and thus reduce revenue sources, are clearly not in the interest of local governments.

Reasonable tax policy is not a barrier to entry. And to the extent that problems may arise in state or local tax policy, the normal mechanisms of legislative and judicial review are available to resolve them. In fact, it appears that each of the four examples cited by the Commission in the NOI has already been resolved without need of Commission intervention.⁸⁰

VIII. THE COMMISSION MUST TAKE INTO ACCOUNT THE IMPACT ON SMALL COMMUNITIES OF ANY PREEMPTIVE RULES.

The Regulatory Flexibility Act ("RFA") requires that the Commission look seriously at alternatives that relieve small entities of regulatory burdens – including small local communities. The Commission has tended to treat this requirement as a formality, as if it were sufficient merely to tack on a pro forma explanation once the Commission had decided

⁸⁰ (1) The petition by Western PSC I Corp. regarding the Oregon assessment of property tax on FCC licenses was subsequently withdrawn by Western after it negotiated a settlement with the Oregon Revenue Department. See Oregon Dept. of Revenue May 20, 1996, Notice of Proposed Tax Assessment. (2) In *Ohio Cellular RSV Limited Partnership v. Board of Public Works of the State of West Virginia*, 189 W.Va. 416, 481 S.E.2d 722; 1996 W.Va. LEXIS 179 (1996), the West Virginia Supreme Court of Appeals affirmed the lower court's decision that an FCC license is not taxable personal property under W.Va. Code 11-5-3 (1961)(definition of personal property).

(3) The Kentucky House Bill, 1996 KY H.B. 125, which would have imposed on commercial radio service providers an annual *ad valorem* tax of 1.5 cents for every \$100 of value of an FCC license or permit, died in the state's Senate Committee on Appropriations and Revenue. (4) In 1996, the Montgomery County, Maryland Council passed a provision over the County Executive's veto, to tax all CMRS providers 92.5 cents for each customer with a billing address in the county (tax effective July 1, 1996). No cases challenging the tax were reported. However, a new Council, elected in 1998, repealed the 'cell phone tax' in the

what to do.⁸¹ The statute, however, requires substantive consideration in advance of decision-making, not merely a *post hoc* "papering of the file."⁸²

In order to avoid conflict with the RFA in any action taken pursuant to the NOI, the Commission must consider *ahead of time* the impact of any potential rules on small localities. Some of these impacts are evident from the comments above. The Commission should consider among other things the financial impact of lost right-of-way and tax revenues and the impact on infrastructure of loss of management control over the public rights-of-way.

Moreover, it is necessary to take into account the more intangible effect of violating the principle of federalism in any proposal that would override local decision-making through federal regulation. Such a violation has an adverse effect on the bedrock democratic principle of self-governance, moving the locus of decision on telecommunications use of the public rights-of-way away from local communities to a distant, unelected agency. The Commission should, if possible, avoid promoting a widespread sense that decisions affecting one's daily life and community are made not by the community, but by regulators and industry lobbyists far away in Washington. Both concrete and intangible effects – particularly on small communities – should be taken into account in the Commission's RFA review of any proposal for rulemaking in this proceeding.

budget for the fiscal year 2000. See *Land Mobile Radio News*, Vol. 50 No. 26, June 28, 1996; *The Baltimore Sun*, Sec. 4B, May 21, 1999 (Attachment A).

⁸¹ See In the Matter of Promotion of Competitive Networks in Local Telecommunications, WT Docket No. 99-217, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Initial Regulatory Flexibility Analysis Comments of the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and Montgomery County, Maryland, filed Aug. 27, 1999.

IX. CONCLUSION

Evidence has not been brought forward to support the hypothesis that local communities' right-of-way or tax policies impede competitive entry. On the contrary, there are sound constitutional and legal reasons for the Commission not to intrude into the property relationships between local communities and telecommunications companies, or into local tax policy. The Commission should turn its attention to addressing barriers at the federal and national level, where its unique expertise and proper jurisdiction lies.

Respectfully submitted,



Frederick E. Ellrod III
Marci L. Frischkorn
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W. #1000
Washington, D.C. 20036-4306
202-785-0600

Counsel for the National Association of Counties,
The United States Conference of Mayors, the
National Association of Telecommunications
Officers And Advisors, the Texas Coalition of
Cities on Franchised Utility Issues, the City of
Dearborn, Michigan, the District of Columbia
Office of Cable Television and
Telecommunications, Montgomery County,
Maryland, Prince George's County, Maryland, the
City of St. Louis, Missouri, and the City and
County of San Francisco

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⁸² Regulatory Flexibility Act, 5 U.S.C. 605(B).